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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-6704

JOHNNY MACK WESTBROOK

Petitioner

V.

CHARLES BALKCOM

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

EDWARD T. M. GARLAND
WILLIAM M. WARNER

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Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioner JOHNNY MACK WESTBROOK respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Georgia denying an application for a Certificate of Probable Cause from the denial of his Petition for a Writ of Habeas Corpus by the Superior Court of Tattnall County, Georgia, said Habeas Corpus Petition having been filed to seek review of his conviction of murder and kidnapping with bodily harm.

OPINIONS BELOW

On September 5, 1978, the Supreme Court of Georgia issued an opinion at 242 Ga. 151, affirming Petitioner's convictions of murder. (Copy attached as Appendix A). The Petitioner subsequently filed a State Petition for Writ of Habeas Corpus which was denied by Judge John Harvey in Tattnall Superior Court. On February 20, 1980, the Georgia Supreme Court issued an Order denying the application for a Certificate of Probable Cause from the Habeas decision (Copy attached as

Appendix B), and on March 4, 1980, the Georgia Supreme Court issued an Order denying a Motion for Rehearing of that Application for Certificate of Probable Cause (Copy attached as Appendix C).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

Judgment of the Supreme Court of Georgia was entered on March 4, 1980.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Georgia Code Annotated, §27-2534.1(b)(7). The seventh aggravating circumstances provided for in the Georgia Death Penalty Statute, and found by the jury in Petitioner's case, is that the offense is "outrageously and wantonly, vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."

The Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Eighth Amendment to the United States Constitution:

> Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishment inflicted.

QUESTIONS PRESENTED ON THE MERITS.

I. Whether the Petitioner's conviction should have been overturned on the ground as presented in his Habeas Corpus action that the evidence presented under Georgia Code Annotated, §27-2534.1(b)(7), was in contravention of the Applicant's Fourteenth Amendment and Eighth Amendment due process rights under the United States Constitution.

II. Whether the defendant under the facts of this particular case was denied his Sixth Amendment right to counsel, in that the actions of his appointed counsel were such as to deny him his right to the assistance of counsel under the Sixth Amendment to the United States Constitution.

STATEMENT OF THE CASE

The Petitioner was convicted in the Superior Court of Jones County, State of Georgia, on two counts of murder and two counts of kidnapping with bodily injury. He was sentenced to death for each murder charge and to life imprisonment for each kidnapping charge.

On September 5, 1978, the Georgia Supreme Court affirmed the conviction. On September 26, 1978, the Georgia Supreme Court denied a rehearing. A Petition for Writ of Habeas Corpus was subsequently filed in Tattnall County Superior Court. A hearing was held before the Honorable John R. Harvey, Judge, in Tattnall Superior Court on June 29, 1979. On November 14, 1979, Judge Harvey entered an order containing findings of fact and conclusions of law that denied the Applicant the Habeas Corpus relief he sought. The Order adjuged that the Petitioner be remanded to the custody of the Respondent in the Habeas Corpus action, Charles Balkcom, for the execution of the Petitioner's death sentence. An application for a Certificate of Probable Cause was timely filed in the Georgia Supreme Court and was subsequently denied on February 20, 1980, by the Georgia Supreme Court. A Motion for Reconsideration was filed and was subsequently denied by the Georgia Supreme Court on March 4, 1980. It is from the denial of his Motion for Reconsideration of the Application for a Certificate of Probable Cause that the Petitioner brings his present action.

REASONS FOR GRANTING THE WRIT

I. WHETHER IN AFFIRMING THE IMPOSITION OF THE SENTENCES OF DEATH IN THE PRESENT CASE, THE GEORGIA SUPREME COURT HAS ADOPTED SUCH A BROAD AND VAGUE CONSTRUCTION OF THE PROVISIONS OF GEORGIA CODE ANNOTATED §27-2534.1(b)(7) AS TO VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The defendant was given a death sentence on the recommendation of the jury in this case based upon two statutory aggravating circumstances under the provisions of the Georgia Code relating to death penalty imposition. On one ground, the jury recommended that the defendant be given the death penalty based on the provisions of Georgia Code Annotated §27-2534.1(b)(7), in that the offense of murder was outrageously and wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind, and an aggravated battery upon the victim.

The defendant was also sentenced to death on the ground that the murder was committed in the commission of another capital felony, to-wit, murder.

In Godfrey v. Georgia, No. 78-6899, Decided May 19, 1980, this Honorable Court overturned the death penalty of the defendant where it was being imposed under the provisions of Section (b)(7). The Court considered in that case, in light of the facts and circumstances of the murders that Godfrey was convicted of committing, whether the Georgia Supreme Court could be said to have applied a constitutional construction to the phrase "outrageously or wantonly vile, horrible or inhuman, in that they involved . . . depravity of mind . . . ." The Court concluded that the answer in that case was no. The Petitioner's crimes, the Court held, could not be said to have reflected a consciousness, materially more depraved than that of any person guilty of murder. This Honorable Court went on to say that as in Gardner v. Florida, 340 U.S. 349, 358, "it is of vital importance to the defendant and to the community that any decision to impose a death sentence be, and appear to be, based on reason

rather than caprice or emotion." Godfrey, supra, at 12.

In Godfrey, the Court spoke about the discretion that is afforded a sentencing body on a matter so grave as a determination of whether a human being should be put to death and whether that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. The Court went on to say that a captial sentencing scheme must, in short, provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. The Court went on to say what this meant:

> This means that if a State wishes to authorize capital punishment, it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the terms for which death may be the sentence in a way that obviates standardless sentence discretion. Gregg v. Georgia, 428 U.S. 153, 196. See also, Proffitt v. Florida, 428 U.S. 242; Jurek v. Texas, 428 U.S. 262. It must channel the sentencer's discretion by clear and objective standards that provides specific and detailed guidance and make rationally reviewable the process for imposing a sentence of death. As was made clear in Gregg, a death penalty system could have standards so vague that they would fail adequately to challenge the sentencing decision patterns of juries with the results that a pattern of arbitrary and capricious sentencing like that found in Furman could occur. Godfrey, supra, at p. 7.

The Court went on to say in its Opinion that there was nothing in the words "outrageously or wantonly vile, horrible and inhuman", standing alone, that implied any inherent restraint on the arbitrary and capricious infliction of the death penalty. The Court went on to say:

> A person of ordinary sensibility could fairly characterize almost every murder as outrageously or wantonly vile, horrible and inhuman. Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not disspelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of any of Section (b)(7)'s terms. In fact, the

jury's interpretation of Section (b)(7) can only be the subject of sheer speculation.

Godfrey, supra, at pp. 7-8.

The trial judge's instructions in the Petitioner's case stand on the same footing as those in Godfrey. It is true that the Petitioner was found guilty of two aggravating circumstances rather than the one aggravating circumstance found in Godfrey. However, by implication from the Godfrey decision, it is apparent that the question of a partially defective sentence may infect the whole sentence as well. This question should be answered by this Court and the Writ of Certiorari granted in this case so that this matter might be resolved.

II. WHETHER THE DEFENDANT UNDER THE FACTS OF THIS PARTICULAR CASE WAS DENIED HIS SIXTH AMENDMENT RIGHT TO COUNSEL, IN THAT THE ACTIONS OF HIS APPOINTED COUNSEL WERE SUCH AS TO DENY HIM HIS RIGHT TO THE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

On the trial of the Petitioner's case in Jones County Superior Court, he was represented by appointed counsel, Denmark Groover. The Petitioner maintains that this Honorable Court should examine in detail the particulars of this ground in that it involves such a fundamental violation of the effective assistance of counsel right of the defendant that, in fact, he was denied the benefit of effective assistance at the sentencing phase of the trial in his death penalty case. The trial transcript reflects the fact that the Petitioner's counsel introduced a descriptive report from the Department of Human Resources for the State of Georgia which fully detailed the applicant's criminal background. It included a total of 59 exhibits which contained, among other things, accusations, sentences, indictments, and reports of the in-custody punishment at various correctional institutions

within the State of Georgia. This was presented to attempt to buttress the counsel's theory of mitigation in the sentencing phase of the trial. The descriptive report, with the attendant exhibits, was introduced at a time when the State said that it planned to put up no further evidence in aggravation of the offense. At this time, of course, the State had not introduced the Applicant's previous record. Only by the action of the Petitioner's trial counsel did this history of incarceration and criminal conduct get before the jury. It is obvious that any theory of the case or judgment of trial counsel in this respect was so grossly prejudicial to the Petitioner's position that it constitutes on its face evidence of the ineffective assistance of counsel.

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.

It is the position of the Petitioner that the action of his trial counsel in regard to the sentencing phase of his trial clearly violates his Sixth Amendment rights to effective assistance of counsel and is also violative of his due process rights under the Fourteenth Amendment to the United States Constitution, in that he is being deprived of his life and liberty by the action of his trial counsel in this regard.

In one of its first opportunities to consider the scope of the Sixth Amendment, in Powell v. Alabama, 287 U.S. 45 (1932), this Honorable Court endorsed a broad reading of the right to court-appointed counsel. Speaking for the Court, Justice Sutherland stated that a layman requires the "guiding hand of counsel" to direct his defense. The Court held that in certain circumstances, the due process clause of the Fourteenth Amendment requires the States to assign counsel

when a defendant is unable to employ counsel and is incapable of conducting his own defense. Narrowly construed, the case can be limited to the mere appointment of counsel; the language in the Opinion, however, suggests that the appointment of counsel must result in effective aid.

The United States Supreme Court appeared to maintain its broad reading of the Sixth Amendment in Johnson v. Zerbst, 304 U.S. 458 (1938), a case arising out of a Federal court's refusal to appoint counsel. In that case the Court stated clearly that the safeguards of the Sixth Amendment were necessary to insure fundamental rights of life and liberty:

> The Sixth Amendment stands as a constant admonition that if the Constitutional safeguards it provides be lost, justice will not . . . be done.

Id. at 462.

The Court held that the Sixth Amendment would not permit a Federal court to "deprive an accused of life and liberty unless he has or waives the assitance of counsel." Id. at 463.

Despite the obvious implications of its holdings in Zerbst and Powell, the Supreme Court enunciated a more restrictive interpretation of the right to court-appointed counsel in State cases in Betts v. Brady, 316 U.S. 455 (1942). In that particular case, the Court held that, except in special cases, the due process clause of the Fourteenth Amendment did not require the incorporation of the Sixth Amendment admonition that counsel be appointed for indigent defendants. Instead, State defendants were required to shoulder the more substantial burden of demonstrating that because they were unable to obtain the assistance of counsel, their rights to due process had been violated. Each case was to be judged on its individual merits, and the defendant bore a substantial burden to demonstrate a violation of due process.

The Supreme Court overruled Betts 21 years later in Gideon v. Wainwright, 372 U.S. 335 (1963). In Gideon, the Federal trial judge, relying on Betts, refused to appoint counsel for an indigent defendant. Florida law provided for the appointment of counsel only where the defendant was charged with a capital offense. Recognizing Gideon's inability to conduct a meaningful cross-examination, the Supreme Court held that appointment of counsel was a fundamental right, essential to a fair trial.

After Gideon, the Sixth Amendment right to appointed counsel applied equally to State and Federal courts. Gideon's implication, however, necessarily extended beyond the mere appointment of counsel. In placing appointment of counsel claims on a Sixth Amendment foundation, and thereby eschewing due process as the appropriate standard, the Supreme Court established a new theoretical and constitutional basis for a defendant's right to counsel in State criminal cases. Under the Betts due process standard, the defendant was required to show a causal relationship between the lack of counsel and the denial of a fair trial. Under the Gideon Sixth Amendment standard, this relationship was presumed once the defendant showed a denial of his right to counsel. Thus, when defendants began to challenge the quality of the assistance provided by the appointed counsel, a fair reading of Gideon suggested an inquiry based on the Sixth Amendment rather than the more stringent standard required under due process.

In the years since Gideon, this Honorable Court has alluded to, but never fully addressed, the right to effective assistance of counsel as an outgrowth of the right to court-appointed counsel. Prior to Gideon, the Court spoke in terms of effective assistance of counsel, but left unclear whether the references were directed solely at situations in which the State interposed

barriers between counsel and client. Post-Gideon decisions suggest, however, that no such limitation applies. Reviewing the validity of a defendant's guilty plea based on erroneous advice given by his counsel, the Court stated in McMann v. Richardson, 396 U.S. 759 (1969), that the question depends "not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases." Id. at 771. According to the Court, the defendant should not be left to the mercies of incompetent counsel. Similarly, the majority opinion in Tollett v. Henderson, 411 U.S. 258 (1962), implied that where a court-appointed counsel is demonstrably incompetent, that factor alone may suffice to deprive a defendant of his constitutional right to effective assistance of counsel. The Court stated that for a defendant to challenge successfully a guilty plea based on faulty advice of counsel, he must demonstrate that the advice was not within the range of competence demanded of attorneys in criminal cases. For the lower courts, the clear implication was that henceforth Gideon provided the proper foundation for the whole range of ineffective assistance claims. The Petitioner's situation reveals representation that under Gideon amounts to his deprivation of the effective assistance of counsel. In effect, he was denied the assistance of counsel for his defense in a death penalty case. The actions of his trial counsel were totally incompetent. Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it effects his ability to assert any other rights that he may have. Without constitutional assurances that appointed counsel will actually assist the accused, the right to counsel, guaranteed by Gideon, is all but meaningless.

For this very substantial reason, the Court should grant the Petitioner's application for Writ of Certiorari.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Georgia Supreme Court.

Respectfully submitted,

GARLAND, NUCKOLLS, KADISH, MARTIN & CATTS, P.C.

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ARGUED APRIL 11, 1978 — DECIDED SEPTEMBER 7, 1978— REHEARING DENIED SEPTEMBER 26, 1978.

Temporary injunction. Cobb Superior Court. Before Judge Ravan.

Jones, Bird & Howell, Jack Spalding Schroder, Jr., Dow N. Kirkpatrick, II, Holcomb & McDuff, Frank D. Holcomb, Clinton A. Harkins, Barnes & Browning, Roy E. Barnes, for appellant.

J. Milton Grubbs, Jr., Adele Platt Grubbs, for appellees.

Erwin, Epting, Gibson & McLeod, Larry V. McLeod, Jay H. Hedgepeth, Hansell, Post, Brandon & Dorsey, Trammell E. Vickery, amicus curiae.

33523. WESTBROOK v. THE STATE.

NICHOLS, Chief Justice.

Appellant Johnny Mack Westbrook was indicted in Jones County for two counts of murder and two counts of kidnapping with bodily injury. He was convicted on all counts and was sentenced to death for each murder and to life imprisonment for each kidnapping.

The case is before this court on appeal and for mandatory review of the death sentences.

The state presented evidence from which the jury was authorized to find the following facts:

On September 23, 1977, appellant and one Eddie William Finney went to the home of Mrs. Thelma Kalish in Macon, Georgia, to cut her lawn. Shortly after appellant and Finney began cutting the grass, they decided that they did not desire to work and conceived the idea of robbing Mrs. Kalish. They lured Mrs. Kalish from her home on a pretext concerning the lawnmower, grabbed her, stuck a pistol in her side, and took her back into her house where they tied her up and both of them raped her.

Mrs. Kalish did not have any cash at home, so they forced her at gunpoint to drive to her bank, to withdraw $600 in cash, and to give it to them. When they arrived back at her house, Mrs. Kalish jumped out of the car,

screamed, and began running toward her neighbor, Mrs. Ann Kaplan, who was standing nearby. Appellant caught Mrs. Kalish and hit her over the head with her pistol. Finney grabbed Mrs. Kaplan and hit her with his fists and a pistol.

Appellant and Finney put the two women into the back seat of Mrs. Kalish's car and drove to a remote, wooded area in Jones County. There they took both women into the woods and tied and gagged them with pieces of Mrs. Kaplan's clothing. Appellant and Finney beat the two women to death with a two-by-four piece of lumber. Appellant killed Mrs. Kaplan and Finney killed Mrs. Kalish. An autopsy revealed that Mrs. Kaplan died of torn lacerations in the heart. Mrs. Kaplan also had bruises on her upper trunk, shoulders and chest. Mrs. Kalish had a three-inch laceration in her forehead, a fractured jaw, a fractured rib, a fractured arm, and several broken teeth. Both women died of blows inflicted by the appellant and Finney.

Appellant and Finney returned to Macon and abandoned Mrs. Kalish's car at the Fifth Street Bridge. Appellant went back to his apartment where he left Mrs. Kaplan's jewelry and his pistol.

That night appellant and Finney took a cab to Mrs. Kalish's house. However, when they saw several police cars, appellant directed the cab driver back to the place where the driver had picked them up. When appellant paid the bill, the cab driver noticed that appellant had a large roll of bills which were still in the band from the bank.

Appellant and Finney were identified through an informer and were placed under arrest. When he was arrested, appellant had $500 in $20 bills in his right sock. A search of appellant's apartment revealed a .32 pistol and loaded clip under the mattress and Mrs. Kaplan's charm bracelet on top of the vanity.

After Finney was arrested, he took law enforcement officers to Jones County where they found the bodies and Mrs. Kalish's purse. Inside the purse was a savings withdrawal slip for $600, dated September 23, 1977.

Finney's fingerprints were found on drinking glasses in Mrs. Kalish's bedroom. Both appellant and Finney

confessed to the crimes.

In order to lay the foundation for his legal arguments, the defendant presented his entire criminal and prison record during the sentencing phase of the trial.

1. In his first enumeration of error, appellant alleges that the trial court erred in refusing to appoint or provide an independent psychiatrist or other qualified person to evaluate his ability and mental capacity. The purpose of the requested evaluation was to assist in his defense, which was based on the theory that as a result of his previous lengthy incarceration, the state virtually had destroyed his mental capacity and, as a result, he did not have the knowledge or understanding necessary to commit a crime with aggravating circumstances or to intelligently, voluntarily and knowingly waive his right to counsel while being interrogated by the police.

Appellant is a pauper and is represented by appointed counsel. Appellant urges that Bounds v. Smith, 430 U. S. 817 (7 SC 1491, 52 LE2d 73) (1977), requiring the states to furnish prisoners "meaningful access to the courts" by way of adequate legal assistance or adequate law libraries, should be extended to require the state to furnish him the services of a psychologist or psychiatrist since such professional services are "basic tools" to provide him an adequate defense. This court feels constrained not to extend the Bounds decision to the facts of this case.

Appellant's attorney admitted that appellant was capable of assisting in his defense and that appellant was neither mentally ill nor insane at the time he committed the offenses.

In the absence of any special plea of insanity by appellant, the request for a psychiatric examination lay within the discretion of the trial court, and the evidence presented at the trial did not raise an issue of insanity. *Holsey v. State*, 235 Ga. 270 (3) (219 SE2d 274) (1975); *Lewis v. State*, 239 Ga. 732 (238 SE2d 892) (1977). Denial of the motion for the appointment of an expert was a matter of trial court discretion and will not be reversed on appeal in the absence of an abuse of that discretion. *Welch v. State*, 237 Ga. 665, 672 (229 SE2d 390) (1976); *Patterson v. State*, 239 Ga. 409, 412 (238 SE2d 2) (1977).

The trial court did not abuse its discretion by denying appellant's request for the appointment of an expert psychiatric witness. The first enumeration of error is without merit.

2. Appellant's second and third enumerations of error contend that the trial court erred, respectively, in overruling his plea in bar and in overruling his motion to suppress. Appellant contends in support of his plea and motion that the state has forfeited its right to seek the death penalty because his lengthy previous sentences and periods of confinement virtually destroyed his mental capacity and caused him to become the sort of person he is now. These enumerations of error are without merit.

3. In the fourth enumeration of error, appellant contends that the court erred in refusing to disqualify the juror Robert A. Morgan for cause, thereby requiring him to use one of his peremptory strikes.

During voir dire, the court granted seven motions by the appellant to strike jurors for cause on the ground that the jurors were not impartial. A motion to strike an eighth juror, Robert Morgan, was denied.

Morgan initially stated he was leaning toward the death penalty. Upon further interrogation, he testified that he would consider all of the evidence and determine whether to impose the death penalty or life imprisonment based upon the evidence presented.

"The conduct of the voir dire is within the discretion of the trial court, and the court's rulings are proper absent some manifest abuse of discretion. *Welch v. State*, 237 Ga. 665 (5) (229 SE2d 390) (1976); *Gatlin v. State*, 236 Ga. 707 (2) (225 SE2d 224) (1976). Whether to strike a juror for cause lies within the discretion of the court. *Welch*, supra." *Patterson v. State*, 239 Ga. 409, 411 (1) (238 SE2d 2) (1977).

In order to disqualify a juror for cause, it must be established that the juror's opinion was so fixed and definite that it would not be changed by the evidence or the charge of the court upon the evidence. *Sullens v. State*, 239 Ga. 766 (1) (238 SE2d 864) (1977). It was not established that Morgan had such a fixed opinion.

This enumeration of error is without merit.

4. In his fifth and sixth enumerations of error, appellant contends that the trial court erred by commenting on the weight and credibility of the opinion of the appellant's expert witness, Dr. Steve Davis, a Mercer University professor of psychology with a doctorate degree in psychology who had been offered by the defense as a psychologist. The court said to the jury during examination of Dr. Davis, and later charged the jury, that Dr. Davis has a Ph.D. in psychology and that is as far as Dr. Davis had qualified himself as an expert. Contrary to appellant's assertions, the court's reference to Dr. Davis' qualifications as an expert was not an expression or intimation of the court's opinion as to what had or had not been proven. Code Ann. § 81-1104. Rather, the court repeatedly charged that the weight and credit to be given to Dr. Davis' testimony was a question for the jury to determine. The trial court's actions and statements in this regard were proper. *McCoy v. State*, 237 Ga. 118, 119 (227 SE2d 18) (1976).

These enumerations of error are without merit.

5. In the seventh enumeration of error, appellant alleged "The Court erred in submitting the issue of the death penalty to the jury on the two murder counts." Appellant asserts in essence that his long incarceration by the state "had the effect of depriving him of the opportunity to be socially adjusted to such an extent that he could truly understand and be aware of the consequences of an act of murder in such a manner as the one that was committed here." This assertion is similar to the contentions raised in the first three enumerations of error. It is without merit.

6. Appellant's assertion in the eighth enumeration of error that the court erred in not permitting the jury to set the penalty with respect to the kidnapping counts is not meritorious inasmuch as the jury had already convicted the appellant of both counts of kidnapping with bodily injury and only one of two sentences could be imposed, either life or death. The appellant cannot complain that the trial court sentenced him to life, the lesser of these punishments, without submitting the issue to the jury where, as here, death sentences could have been imposed for these offenses because the victims died.

See *Stanley v. State*, 240 Ga. 341 (241 SE2d 173) (1977); *Thomas v. State*, 240 Ga. 393 (242 SE2d 1) (1977).

7. In the ninth enumeration of error, the appellant alleged "The Court erred in his charge with respect to the kidnapping counts when he gave to the jury that portion of the statute which referred to a possible punishment of less than life imprisonment."

The trial court explicitly charged the jury that "if the person kidnapped shall have received bodily injury, the person convicted shall be punished by life imprisonment or by death." Inasmuch as the jury already had convicted the appellant of kidnapping with bodily injury on both counts, the fact that the trial court read Code § 26-1311 in its entirety, including the punishment for simple kidnapping, could not have misled the jury or harmed the appellant.

This enumeration of error is without merit.

8. In the tenth enumeration of error, appellant contends: "The Court erred in failing in his charge on the punishment portion of the trial to make it clear to the jury that the jury could impose a life sentence despite the existence of aggravating circumstances."

As to both of the counts for murder, the trial court charged the jury that one of their possible verdicts was: "We, the jury, find the defendant guilty . . . the following statutory aggravating circumstance or circumstances, having been found by the jury, to-wit . . . and we recommend mercy or that the defendant's punishment be life imprisonment."

This option is also contained on the work sheets furnished to the jury on both murder counts.

This enumeration of error is without merit. *Fleming v. State*, 240 Ga. 142 (240 SE2d 37) (1977); *Hawes v. State*, 240 Ga. 327 (240 SE2d 833) (1977).

Sentence Review

The sentences have been reviewed by this court as required by Ga. L. 1973, p. 159 et seq. (Code Ann. § 27-2537(c)(1-3)), as has been done in each case involving a death penalty under this statute. Upon considering the statutory aggravating circumstances found by the jury and the evidence concerning the crimes and the defendant, this court concludes that the sentences of

death imposed on Johnny Mack Westbrook were not imposed under the influence of passion, prejudice or any other arbitrary factor.

The jury found statutory aggravating circumstances as to the murder of Mrs. Kaplan in that the offense of murder was outrageously or wantonly vile, horrible or inhumane in that it involved torture, depravity of mind or an aggravated battery to the victim (Code Ann. § 27-2534.1 (b) (7)) and that the murder was committed in the commission of another capital felony, to wit: murder. Code Ann. § 27-2534.1 (b) (2). As to the murder of Mrs. Kalish, the jury found that the murder was outrageously or wantonly vile, horrible or inhumane in that it involved torture, depravity of mind or an aggravated battery to the victim. Code Ann. § 27-2534.1 (b) (7).

The jury's findings of statutory aggravating circumstances are supported by the evidence and the verdict is factually substantiated.

In reviewing the death penalty in this case, this court has considered the cases appealed since January 1, 1970, in which a death or life sentence was imposed. The similar cases listed in the appendix support affirmance of the death penalty.

Prior to these offenses, appellant has compiled a criminal record that includes convictions for eleven burglaries, one attempted burglary, one simple larceny, one concealed weapon offense, one possession of an unlicensed pistol offense and two escapes. His prison record, entered by the defense, indicates 34 prison offenses while in confinement.

Johnny Mack Westbrook's death sentences for these murders are not excessive or disproportionate to the penalty imposed in similar cases, considering both the crimes and the defendant.

Judgment affirmed. All the Justices concur.

ARGUED MAY 8, 1978 — DECIDED SEPTEMBER 5, 1978 — REHEARING DENIED SEPTEMBER 26, 1978.

Murder, etc. Jones Superior Court. Before Judge Duke.

Denmark Groover, Jr., Frank D. Farrar, Jr., for appellant.

Joe Briley, District Attorney, Arthur K. Bolton, Attorney General, Harrison Kohler, Assistant Attorney General, for appellee.

APPENDIX.

House v. State, 232 Ga. 140 (205 SE2d 217) (1974); *Gregg v. State,* 233 Ga. 117 (210 SE2d 659) (1974); *Floyd v. State,* 233 Ga. 280 (210 SE2d 810) (1974); *Chenault v. State,* 234 Ga. 216 (215 SE2d 223) (1975); *Smith v. State,* 236 Ga. 12 (222 SE2d 308) (1976); *Birt v. State,* 236 Ga. 815 (225 SE2d 248) (1976); *Coleman v. State,* 237 Ga. 84 (226 SE2d 911) (1976); *Isaacs v. State,* 237 Ga. 105 (226 SE2d 922) (1976); *Dungee v. State,* 237 Ga. 218 (227 SE2d 746) (1976); *Banks v. State,* 237 Ga. 325 (227 SE2d 380) (1976); *Young v. State,* 239 Ga. 53 (236 SE2d 1) (1977); *Gaddis v. State,* 239 Ga. 238 (236 SE2d 594) (1977); *Peek v. State,* 239 Ga. 422 (238 SE2d 12) (1977).

33569. FLETCHER v. FLETCHER.

HILL, Justice.

In 1970, Henry Fletcher executed a deed conveying his only asset, 1,127 acres of land in Irwin County, to his brother, Jehue Fletcher. Both brothers are now deceased. This is a suit by the administratrix of the estate of Henry Fletcher to set aside the deed on the grounds of mental incapacity of Henry and undue influence by Jehue. The defendant, the widow of Jehue Fletcher, appeals from the judgment entered upon the jury's verdict setting aside the conveyance.

The two brothers lived and farmed together all of their lives. Henry, born in 1896, never married. He died in 1976 at age 80. Jehue married the defendant in 1930 and she moved into the family homeplace in 1936. Although Henry had record ownership of the property in question from 1917 when he inherited it from his father until 1970 when he deeded it to his brother, Henry never returned the property for taxes. All taxes were paid and all business transactions concerning the property were

SUPREME COURT OF GEORGIA

ATLANTA, February 20, 1980

The Honorable Supreme Court met pursuant to adjournment.

e following order was passed:

JOHNNY MACK WESTBROOK V. CHARLES BALKCOM, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams, Clerk.

Appendix B

Applic. No. 1106

SUPREME COURT OF GEORGIA

ATLANTA, March 4, 1980

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

JOHNNY MACK WESTBROOK V. CHARLES BALKCOM, WARDEN

Upon consideration of the Motion for Reconsideration filed in this application, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Hazel E. Shelford, Deputy Clerk.

Appendix C

RECEIVED
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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

JOHNNY MACK WESTBROOK :
:
Petitioner :
: CASE NO. 79-6704
V. :
:
CHARLES BALKCOM, Warden :
:
Respondent :

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Petitioner, JOHNNY MACK WESTBROOK, who is now confined in the Georgia Diagnostic Center in Jackson, Georgia, under a sentence of death, asks leave to file the attached Petition for Writ of Certiorari to the United States Supreme Court without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The Petitioner's Affidavit in support of this motion is attached hereto.

Respectfully submitted,

GARLAND, NUCKOLLS, KADISH, MARTIN & CATTS, P.C.

Edward T. M. Garland
EDWARD T. M. GARLAND

William M. Warner
WILLIAM M. WARNER
ATTORNEYS FOR PETITIONER

1012 Candler Building
Atlanta, Georgia 30303
(404) 577-2225

IN THE SUPREME COURT OF THE UNITED STATES

JOHNNY MACK WESTBROOK :
Petitioner :
:
VS. :
:
THE STATE OF GEORGIA :
Respondent :

PAUPER'S AFFIDAVIT

Comes now the undersigned, Johnny Mack Westbrook, before the undersigned officer, authorized to administer oaths, the Petitioner for the Writ of Certiorari and on oath swears that because of his poverty he is unable to pay the costs of Appeal and/or Application for Certiorari in his case and is required to proceed in forma pauperis. This affidavit is made in connection with an application to the Supreme Court to proceed in forma pauperis.

Johnny Mack Westbrook
JOHNNY MACK WESTBROOK

Sworn to and subscribed before me
this 13th day of Oct., 1978

Mabel A. Hardy
Notary Public, Georgia, State at Large

Notary Public, Georgia State at Large
My Commission Expires Sept. 14, 1981

AFFIDAVIT OF COUNSEL

WILLIAM M. WARNER personally appeared before the undersigned officer, duly authorized to administer oaths, and WILLIAM M. WARNER, having been sworn, stated the following:

1.

My name is William M. Warner. I am counsel for Johnny Mack Westbrook, who currently is under a death penalty sentence. This Affidavit is based on my personal knowledge of the case and is executed for use in the case of Johnny Mack Wesbrook v. Charles Balkcom, who is currently filing his Petition for a Writ of Certiorari to the United States Supreme Court.

2.

Johnny Mack Westbrook, from the inception of this case, has had court-appointed counsel because of his indigency. He has proceeded in forma pauperis (See Exhibits A and B) at every stage of the proceedings. His present legal services are being done pro bono by me.

3.

Johnny Mack Westbrook is to the best of my knowledge completely indigent. It is respectfully requested that he be allowed to proceed in this matter in forma pauperis.

Wm M. Warner

WILLIAM M. WARNER

Sworn to and subscribed before me,
this 2nd day of June, 1980.

Gail W Stowers

NOTARY PUBLIC

Notary Public, Georgia, State at Large
My Commission Expires Nov. 28, 1983

IN THE SUPREME COURT OF GEORGIA

JOHNNY MACK WESTBROOK, :

Appellant :

VS. :

THE STATE OF GEORGIA, :

Appellee :

PAUPER'S AFFIDAVIT

COMES NOW the undersigned, JOHNNY MACK WESTBROOK, appellant in the foregoing case, and on oath before the undersigned officer authorized to administer oaths swears that because of his poverty he is unable to pay the costs of appeal in his case.

This affidavit is made so that the undersigned's appeal may proceed in forma pauperis.

Johnny Mack Westbrook
JOHNNY MACK WESTBROOK

Sworn to and subscribed
before me this 10th day of
February, 1978.

Hal Kittaway
Notary Public

FILED IN OFFICE THIS 31st DAY
OF March 1978
W. F. Peters
CLERK

EXHIBIT A

IN THE SUPREME COURT OF THE UNITED STATES

JOHNNY MACK WESTBROOK :
Petitioner :
:
VS. :
:
THE STATE OF GEORGIA :
Respondent :

PAUPER'S AFFIDAVIT

Comes now the undersigned, Johnny Mack Westbrook, before the undersigned officer, authorized to administer oaths, the Petitioner for the Writ of Certiorari and on oath swears that because of his poverty he is unable to pay the costs of Appeal and/or Application for Certiorari in his case and is required to proceed in forma pauperis. This affidavit is made in connection with an application to the Supreme Court to proceed in forma pauperis.

Johnny Mack Westbrook
JOHNNY MACK WESTBROOK

Sworn to and subscribed before me
this 13 day of Oct, 1978

Mable A Hardi
Notary Public, Georgia, State at Large

Notary Public, Georgia State at Large
My Commission Expires Sept. 14, 1981

EXHIBIT B

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the within and foregoing Motion For Leave to Proceed In Forma Pauperis upon Mr. Harrison Koehler, Assistant Attorney General, State of Georgia, State Judicial Building, Capitol Square, Atlanta, Georgia, by depositing same in the United States Mail in a properly addressed envelope with adequate postage thereon.

This the 2nd day of June, 1980.

William M. Warner

WILLIAM M. WARNER

16

RECEIVED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79- 6704

ORIGINAL COPY

JOHNNY MACK WESTBROOK,

Petitioner,

v.

CHARLES BALKCOM,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

HARRISON KOHLER
Assistant Attorney General

Please serve:

HARRISON KOHLER
132 State Judicial Bldg.
40 Capitol Square
Atlanta, Georgia 30334
(404) 656-3359

I N D E X

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79- 6704

JOHNNY MACK WESTBROOK,

Petitioner,

v.

CHARLES BALKCOM,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

Is the imposition of Petitioner's death penalty constitutional?

Did Petitioner receive effective assistance of counsel during the sentencing phase of the trial?

STATEMENT OF THE CASE

The material facts of Petitioner Johnny Mack Westbrook's case are undisputed. On September 23, 1977, Petitioner and Eddie Finney went to the home of Mrs. Thelma Kalish at 1183 Jackson Springs Road in Macon, Georgia (T. 219, 259).[1/] Under the pretext of needing gasoline to cut her lawn, Finney lured Mrs. Kalish outside her home. (T. 219). Petitioner grabbed her, stuck a pistol in her side, and took her back into her home. (T. 219, 259). There they tied up Mrs. Kalish, and both Petitioner and Finney raped her. (T. 219, 222, 259, 302).

Mrs. Kalish did not have any cash at home, so they took her to Macon Federal Savings Bank and forced her to withdraw $600 in cash. (T. 196-98, 223, 261, 264). They returned to her home, but when they arrived, Mrs. Kalish jumped out of the car and began running. (T. 223-24, 261). Petitioner caught her and hit her over the head with his pistol. (T. 224). When a neighbor, Mrs. Ann Kaplan, heard the noise and came outside, Finney grabbed Mrs. Kaplan and hit her with his fists and a pistol. (T. 224, 262, 265-66).

Petitioner and Finney put the two women in the back seat of Mrs. Kalish's car and drove to a wooded area in Jones County, Georgia (T. 224, 262). There they took the women into the woods and tied and gagged them. (T. 225, 262). In order to eliminate witnesses to their rape and robbery, Petitioner and

---

1/ T. refers to the trial transcript.

Finney beat the two women to death with a two-by-four piece of lumber. (T. 225-26, 262-63). Petitioner murdered Mrs. Kaplan and Finney murdered Mrs. Kalish. (T. 226, 263). An autopsy revealed that Mrs. Kaplan died of torn lacerations in the heart. (T. 300-01). Mrs. Kaplan also had bruises on her upper trunk, shoulders and chest; and Mrs. Kalish had a three-inch laceration in her forehead, a fractured jaw, a fractured rib, a fractured arm, and several broken teeth. (T. 298-99, 301-02, 304).

Petitioner and Finney returned to Macon and abandoned Mrs. Kalish's car at the Fifth Street Bridge. (T. 226, 263). Petitioner went back to his apartment where he left Mrs. Kaplan's jewelry and his pistol. (T. 226).

That night Petitioner and Finney took a cab to Jackson Springs Road; however, when they saw several police cars, Petitioner directed the cab driver back to the place where the driver picked them up. (T. 188-190). When Petitioner paid the bill, the driver noticed that Petitioner had a large roll of bills which were still in the band from the bank. (T. 191-92).

Through an informer, police identified Petitioner and Finney as the felons, and Deputy Gerald Butterworth placed Petitioner under arrest. (T. 208-09). When he was arrested, Petitioner had $500 in $20-bills in his right sock. (T. 209-10). A search of Petitioner's apartment revealed a .32 pistol and loaded clip under the mattress and Mrs. Kaplan's charm bracelet on top of the vanity. (T. 311-12, 314).

After Finney was arrested, he took law enforcement officers to Jones County where they found the bodies and Mrs. Kalish's purse. (T. 202-03). Inside the purse was a savings withdrawal slip for $600, dated September 23, 1977. (T. 280).

Finney's fingerprints were found on drinking glasses in Mrs. Kalish's bedroom, and both Petitioner and Finney confessed to the crimes. (T. 221, 276, 341-42).

Petitioner was indicted by a Jones County grand jury for two counts of murder and two counts of kidnapping with bodily injury. (R. 11-12).[2/] He was tried in the Jones County Superior Court November 7-9, 1977; and the jury found him guilty of all four charges. (R. 12, Transcript Cover Page).

The jury found that the murders of Mrs. Kaplan and Mrs. Kalish were outrageously or wantonly vile, horrible or inhuman in that they involved torture, depravity of mind or an aggravated battery to the victims. (R. 57, 59). The jury also found that the murder of Mrs. Kaplan was committed while Petitioner was murdering Mrs. Kalish. (R. 57). The jury recommended the death penalty for both murders (R. 57, 59-61), and Petitioner received two life sentences for the kidnappings. (R. 62-63).

2/ R. refers to the record of the pleadings in the Superior Court of Jones County, Georgia.

Petitioner's conviction and sentence were affirmed on direct appeal. Westbrook v. State, 242 Ga. 151, 249 S.E.2d 524 (1978), cert. denied, 439 U.S. 1102 (1979). He had a habeas corpus hearing in the Superior Court of Tattnall County, Georgia, which dismissed the petition; and the Georgia Supreme Court denied a certificate of probable cause to appeal.

REASONS FOR NOT GRANTING THE WRIT

A. THE IMPOSITION OF PETITIONER'S DEATH PENALTY IS CONSTITUTIONAL.

In Godfrey v. Georgia, ___ U.S. ___, 27 Crim.L.Rptr. 3109 (1980), this Court vacated a death penalty imposed for the shotgun slaying of two persons. Both victims died instantly and there was no tortune or physical injury prior to death. Id. at 3117, 3119. The only statutory aggravating circumstance was Ga. Code Ann. § 27-2534.1(b)(7), i.e., "the offense of murder was outrageously or wantonly vile, horrible and inhuman." Id., at 3117.

In Petitioner's case Mrs. Kalish was raped prior to being murdered and both women were beaten to death with boards. Therefore, Petitioner's case is factually distinguishable from Godfrey. Moreover, the jury found another aggravating circumstance. The murder of Mrs. Kaplan occurred during the course of another capital felony, the murder of Mrs. Kalish. See

Ga. Code Ann. § 27-2534.1(b)(2). Where there is a valid aggravating circumstance to support the imposition of the death penalty, the vacating of a second aggravating circumstance leaves undisturbed the death penalty. See, Stephens v. State, 237 Ga. 259, 261-62, 227 S.E.2d 261 (1976), cert. denied, 429 U.S. 986 (1976); Stephens v. Hopper, 241 Ga. 596, 603-04, 247 S.E.2d 92 (1978), cert. denied, 439 U.S. 991 (1978).

B. PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL DURING THE SENTENCING PHASE OF THE TRIAL.

Petitioner's attorney was faced with an extremely difficult task. It was undisputed Petitioner and Finney had kidnapped, and brutally murdered two elderly women.

During the guilt-innocence phase of the trial, Petitioner had been convicted of two counts of murder and two counts of kidnapping. His attorney attempted to get sympathy for the Petitioner by showing that in 1951 at age 14, Petitioner, a black, had without counsel pled guilty to a number of burglary charges and received 85 years imprisonment. Since the age of 14, Petitioner had spent all but 3 years of his life in prison. However, Petitioner was not able to remember when he went to prison or when he got out, and his attorney believed Petitioner's correctional file was the most dramatic way to show what had happened to Petitioner during his adult life.

There were six blacks on the petit jury, and Petitioner's attorney hoped to inflame them against a judicial system that treated a 14-year-old black the way Petitioner had been treated. The attorney wanted to show that by its inhuman treatment of Petitioner, the State had forfeited its right to execute him. The attorney hoped that some of the persons on the jury would hold out for life imprisonment.

The Sixth Amendment requires not counsel judged ineffective by hindsight but counsel reasonably likely to render and rendering reasonably effective assistance. MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), cert. denied, 368 U.S. 877 (1961); Haggard v. Alabama, 550 F.2d 1019, 1022 (5th Cir. 1977).

Ineffective assistance of counsel is not established merely because in retrospect another attorney would have handled the case differently. United States v. Rodriguez, 498 F.2d 302, 309-10 (5th Cir. 1974). Petitioner's attorney made a reasonable tactical discussion in a very difficult case, and Petitioner was not deprived of effective assistance of counsel during the sentencing phase of the trial.

CONCLUSION

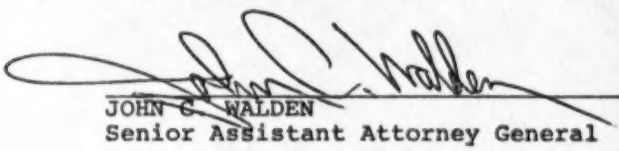
This Court should refuse to grant a writ of certiorari because no sufficient reasons for review have been set forth by the Petitioner.

Respectfully submitted,

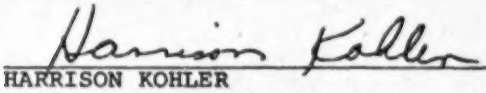
ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant Attorney General



JOHN C. WALDEN
Senior Assistant Attorney General



HARRISON KOHLER
Assistant Attorney General